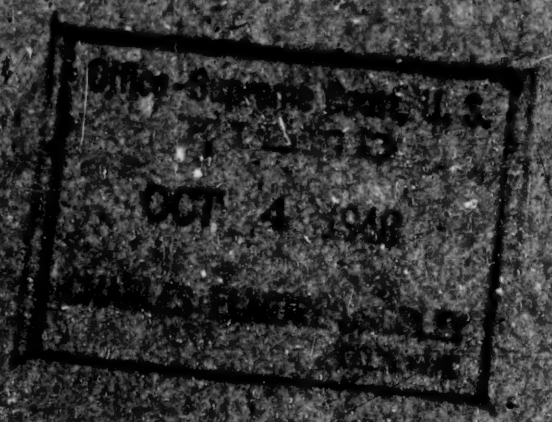

No. 6

In the Supreme Court of the United States

October Term, 1948

GRAND RIVER DAM AUTHORITY, A Public Corporation, Petitioner,

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
The interest of the United States	8
Summary of argument	9
Argument:	
Introduction	16
I. The court below erred in holding Grand-Hydro entitled to compensation for any power site value of the lands taken	16
A. Existence of power site value depends on a use of the land which is unlawful under the Federal Power Act	19
1. Section 23 (b) of the Federal Power Act prohibits such use without federal permission	19
2. The Section 23 (b) statutory permission effective upon a Commission finding may not be assumed to be obtainable under the facts of this case	25
3. Federal permission through license may not be assumed to be obtainable	29
B. Power site value based on a hypothetical development requiring federal license is not a compensable private property interest	31
1. There is no private property right in the use of water for power purposes where such use affects navigable waters of the United States	32
2. The federal licensing provisions do not recognize or allow private property rights in power site value	47
II. The court below decided one or more federal questions	66
Conclusion	71
Appendix	72

CITATIONS

Cases:	
Abie State Bank v. *Bryan*, 282 U. S. 765	70
Alabama Power Co. v. *F. P. C.*, 1 F. P. C. 25	63

Cases—Continued

	Page
Alabama Power Co. v. *F. P. C.*, 128 F. 2d 280	64
Alabama Power Co. v. *F. P. C.* 2 F. P. C. 312	64
Alabama Power Co. v. *Gulf Power Co.*, 283 Fed. 606	48, 55
Alabama Power Co. v. *McNinch*, 94 F. 2d 601	63
Alabama Power Co. v. *Smith*, 229 Ala. 105	54
Arizona v. *California*, 283 U. S. 423	12, 45
Bell v. *Hood*, 327 U. S. 678	68
Bellows Falls Hydro-Electric Corporation, et al., Projects Nos. 1855, 1892, Docket No. E-6145, decided July 9, 1948	66
Brewer-Elliott Oil & Gas Company v. *United States*, 260 U. S. 77	24
Caldarola v. *Eckert*, 332 U. S. 155	68
Continental Land Co. v. *United States*, 88 F. 2d 104, certiorari denied, 302 U. S. 715	37
Corrigan Transit Co. v. *Sanitary District*, 137 Fed. 851	54
Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 243 U. S. 157	16, 70
First Iowa Coop. v. *Federal Power Comm'n*, 328 U. S. 152	20, 35, 55
Georgia Power Co. v. *Federal Power Commission*, 152 F. 2d 908	21
Grand-Hydro v. *Grand River Dam Authority*, 192 Okla. 693	3
Grand River Dam Authority v. *Going*, 29 F. Supp. 316	24
Henry Ford and Son, Inc. v. *Little Falls Fibre Co.*, 280 U. S. 369	54
Louisville Hydroelectric Co. v. *Coburn*, 270 Ky. 624	54
Miller's Executors v. *Swann*, 150 U. S. 132	15, 69
Monongahela Navigation Co. v. *United States*, 148 U. S. 312	37
Niagara Falls Power Co., 73 P. U. R. N. S. 28	8, 65
Niagara Falls Power Co. v. *F. P. C.*, 137 F. 2d 787, certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815	65
Nutt v. *Knut*, 200 U. S. 12	68
Oklahoma v. *Atkinson Co.*, 313 U. S. 508	12, 42, 45
Pennsylvania Water & Power Co. v. *F. P. C.*, 123 F. 2d 155, certiorari denied, 315 U. S. 806	65
Smith v. *Kansas City Title Co.*, 255 U. S. 180	68
Standard Oil Co. v. *Johnson*, 316 U. S. 481	68
State Tax Com'n v. *Van Cott*, 306 U. S. 511	69
United States v. *Appalachian Electric Power Co.*, 311 U. S. 377	12, 36, 37, 39, 44, 49
United States v. *Bellingham Bay Boom Co.*, 176 U. S. 211	68
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	12, 37, 38, 39, 44, 45, 46, 67
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592	45
United States v. *Cress*, 243 U. S. 316	13, 45
United States v. *Oklahoma*, 168 F. 2d 858	5, 22
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690	12, 34
United States v. *Willow River Co.*, 324 U. S. 499	12, 32, 37, 40, 41, 42, 45

Cases—Continued	Page
United States ex rel T. V. A. v. *Powelson*, 319 U. S. 266	9
Washington Water Power Co. v. *United States*, 135 F. 2d 541, certiorari denied, 320 U. S. 747	37
Wisconsin Public Service Corporation v. *F. P. C.*, 147 F. 2d 743, certiorari denied, 325 U. S. 880	65
Statutes:	
River and Harbor Act of 1890, 26 Stat. 426, 454:	
Section 7	33
Section 10	33
River and Harbor Act of March 3, 1899, 30 Stat. 1151:	
Section 9	34
Section 10	34, 72
General Dam Act of 1906, 34 Stat. 386	35
General Dam Act of 1910, 36 Stat. 593	35
Federal Power Act of June 10, 1920, c. 285, 41 Stat. 1063, as amended, 16 U. S. C. 791, *et seq.*:	
Section 3 (2)	27
Section 3 (7)	30
Section 3 (13)	9, 14, 52, 72
Section 4 (b)	49
Section 4 (e)	28, 29, 48, 49
Section 4 (g)	73
Section 6	49
Section 7	29, 49, 74
Section 7 (a)	11
Section 7 (b)	30
Section 8	49
Section 10	31, 49
Section 10 (e)	14, 31, 53, 54, 75
Section 10 (f)	48
Section 11	49
Section 12	49
Section 13	49
Section 14	9, 14, 52, 53, 55, 75
Section 15	9, 76
Section 16	9, 49, 77
Section 18	49
Section 19	14, 49, 52, 78
Section 20	14, 49, 52, 79
Section 21	48
Section 22	49
Section 23 (b)	10, 19, 20, 26, 27, 28, 82
Section 27	53, 55, 82
Section 28	48
Section 210	36
Section 301	49
Section 302	49
Section 304	49

Statutes—Continued Page
Federal Water Power Act (see Federal Power Act).
Flood Control Act of June 22, 1936, 49 Stat. 1570 21
Flood Control Act of August 18, 1941, 55 Stat. 638 22
Act of July 24, 1946, 60 Stat. 634 22
Public Law 296, 80th Cong., 1st Sess., approved July 31, 1947 22
28 U. S. C. 1257 (3) 16
Okla. Laws 1935, c. 70, as amended, Okla. Stat. 1941, Title 82, secs. 861–881 4, 30
Miscellaneous:
56 Cong. Rec. 9037–9038, 9047 14, 60
House Committee on Water Power, Report No. 61, 66th Cong., 1st Sess., June 24, 1919 35
House Committee on Water Power, Water Power Hearings, 65th Cong., 2d Sess. (1919 Printing) 59
H. Doc. No. 107, 76th Cong., 1st Sess 6, 21
H. Doc. No. 242, 67th Cong., 2d Sess., Federal Power Commission, First Annual Report, 1921 23
H. Doc. 295, 41st Cong., 2d Sess 21
H. Doc. No. 308, 74th Cong., 1st Sess 6, 21
H. Rep. No. 842, 63rd Cong., 2d Sess 57
Kerwin, *Federal Water Power Legislation* 33, 35
Rushmore and Loft, *Hydro Electric Power Stations*, (1923) 33
Senate Committee on Commerce, Report No. 180, 66th Cong., 1st Sess 35
S. Rep. No. 66, 64th Cong., 1st Sess 58
Veto Message Relating to the Building of a Dam Across the James River, Stone County, Missouri, H. Doc. No. 1350, 60th Cong., 2d Sess 56
Veto Message Relating to Extension of Time for Construction of Dam Across Rainy River, Sen. Doc. No. 438, 60th Cong., 1st Sess 14, 56

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 6

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION, PETITIONER

v.

GRAND-HYDRO, A PRIVATE CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR THE UNITED STATES, AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma on the first appeal (R. 88–101) is reported at 192 Okla. 693. Its opinion upon the second appeal (R. 670) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on May 20, 1947 (R. 677) and a petition for rehearing was denied on July 1, 1947 (R. 707). The petition for a writ of certiorari was filed on October 1, 1947, and granted on March 15, 1948 (R. 712). The jurisdiction of

this Court was invoked under Section 237 of the Judicial Code, as amended (now 28 U. S. C. 1257 (3)).

QUESTIONS PRESENTED

The petitioner brought these proceedings to condemn lands necessary to the construction of a power, irrigation, and flood control project on a nonnavigable tributary of a navigable water of the United States. The Federal Power Commission had issued a license to the petitioner after finding that the proposed project would "affect the interests of interstate commerce." In the state courts, the respondent claimed, and was allowed, compensation based principally upon the value of the lands as a site for a power project of substantially the same character as the petitioner had been licensed to construct.

The questions presented are:

1. Whether the respondent or its grantee might legally apply the property to use as a site for a power project.

2. Whether the respondent has a compensable property right in the use of the river waters for the generation of electric power.

3. Whether the decision of the Supreme Court of Oklahoma answering these questions in the affirmative presents federal questions.

STATUTES INVOLVED

The pertinent provisions of the River and Harbor Act of 1899, 30 Stat. 1121, 1151, 33

U. S. C. 403, and of the Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, are set out in the Appendix, *infra*, pp. 72–82.

STATEMENT

This is a proceeding by the Grand River Dam Authority (hereinafter referred to as the Authority) to condemn 1,462 acres of land owned by Grand-Hydro, including a 417-acre parcel upon which the Authority's Pensacola dam has been constructed. Both parties having excepted to the Commissioners' award in the total sum of $281,802.74 (R. 70–71), a jury trial was had resulting in a verdict for $156,250 (R. 74) under rulings which excluded power site value (R. 101). Upon appeal by Grand-Hydro, the judgment entered upon this verdict was reversed, *Grand-Hydro v. Grand River Dam Authority*, 192 Okla. 693. Pursuant to the mandate of reversal, a new trial was had, resulting in a verdict for $800,000 (R. 629) under rulings permitting the inclusion of power-site value. Appeal was taken by the Authority upon the overruling of its motion for new trial (R. 642). The Supreme Court of Oklahoma affirmed the award (R. 670–677). The facts which are material to the questions discussed in this brief may be summarized as follows:

Grand-Hydro was incorporated in 1929 for the purpose of developing water power and irrigation on the Grand River (R. 113–114, 115). However, it never commenced construction of a dam or of

any other works going to the development of a hydroelectric project (R. 122). It never filed with the Federal Power Commission any declaration of intention to construct a project nor any application for a permit or license to do so and no license or permit was ever issued to Grand-Hydro (R. 111).

The Grand River Dam Authority, which is a conservation and reclamation district, was created in 1935, by the State of Oklahoma, as a governmental ageney for the purpose of utilizing the waters of the Grand River for power, irrigation, flood control, and other uses. Okla. Laws 1935, c. 70, as amended, Okla. Stat. 1941, Title 82, secs. 861–881. Various steps were taken in execution of this purpose, including the making of a loan and grant agreement with the Federal Government relating to financing of the enterprise (R. 105, 459, 565, 706). The Authority proceeded to acquire the lands needed for the reservoir pool, about forty percent of them being acquired by condemnation (R. 524–525).

In December 1937, the Authority filed with the Federal Power Commission a declaration of its intention to erect the Pensacola Dam pursuant to Section 23 (b) of the Federal Power Act (Pltf.'s Exs. 4, 5; R. 456–460). In February 1938, the Commission considered the declaration of intention, and, it appearing that (R. 486):

> (e) The construction and operation of said project as proposed by the declarant

> will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary;

the Commission found that (R. 486):

> The construction and operation of said project in the manner proposed by declarant will affect the interests of interstate commerce.

Thereupon, in May 1938, the Authority filed with the Commission an application for a license (Pltf.'s Ex. 1; R. 104–110). In July 1939, such a license was issued subject to various conditions which were accepted by the Authority (Pltf.'s Ex. 7; R. 462–475). One of the provisions of the license was that the top ten feet, vertically, of the reservoir should be operated for flood control purposes (R. 470). This provision contemplated acquisition by the United States of necessary flowage rights over lands which would be inundated by the raising of the pool level the top five feet, vertically, and this has been done. See *United States* v. *Oklahoma*, 168 F. 2d 858 (C. C. A. 10).

In July 1938, Grand-Hydro authorized the Authority to use the company's lands for construction purposes, compensation to be later determined (R. 141). Attempts to agree on compensation having failed, this proceeding was instituted in February 1939 (R. 32–52).

At the second trial, Grand-Hydro claimed a large value for the 417-acre tract because of possible use for dam site purposes. To show adaptability for such purposes, respondents introduced in evidence a report made in 1929 by Mead and Seastone which was based upon a survey made by Fargo Engineering Company (R. 254–269, 119–120, 391–445); portions of a report made by the War Department in 1935 upon the Arkansas River and its tributaries including the Grand River (H. Doc. No. 308, 74th Cong., 1st Sess., R. 174–178, 448–451); a report made by the National Resources Board in 1936 (R. 145–161, 589–590); and a report submitted by the War Department in 1939 recommending certain projects on the Grand River (H. Doc. No. 107, 76th Cong., 1st Sess., R. 162–174, 452–456, 557–558).

The estimates of the four witnesses of land value based on possible use for power purposes ranged from $750,000 to $1,000,000 (R. 324, 346, 361–362, 379). These appraisals were made without regard to whether or not Grand-Hydro possessed a license to build the dam (R. 319, 333–334, 361, 371, 378). The respondent's witnesses assumed, for purposes of valuation, that a power project similar to that which had been constructed by the Authority would be put into operation (R. 335, 336–337, 348, 366). The Authority objected to these appraisals and moved to strike them on the ground, among others, that

Grand-Hydro had not filed a declaration of intention under the Federal Power Act, had not obtained a license under that Act, nor had the Commission found that the proposed structure would not affect interests of interstate commerce (R. 321–322, 345, 361–362, 387–389). The question was again raised at the close of the trial by plaintiff's requested instructions, Nos. 26, 33–38 (R. 604, 607–613), all of which were denied, and by exceptions to the giving of defendant's requested instruction No. 10 (R. 623–624) in which the court told the jury: "You should put out of consideration entirely the fact that Grand-Hydro was not possessed of a license from the Federal Power Commission authorizing it to appropriate the waters of the Grand River to beneficial use."

The Authority appealed to the Supreme Court of Oklahoma and a brief *amicus curiae* was filed by the United States, directed solely to the issue relating to the federal power license. On May 20, 1947, the judgment was affirmed (R. 670–677). As to the federal power license, the court stated (R. 676):

> Although the Authority had been granted a license by the Federal Power Commission granting it the exclusive right to use the 417 acre tract as a dam site, it could not thereby take private property without just compensation. Nor was the issuance of such license intended to have that effect because the plain provision requires the licensee to pay all damages to the property

of others caused by the construction, operation and maintenance of the project. In addition, the Federal Power Commission based its authority to take jurisdiction upon a finding of fact that the construction and operation of the project "as proposed by the declarant will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary." The Commission would have no authority whatever if the dam site were used for the construction of such a dam that the navigability of the Arkansas River would not be affected.

THE INTEREST OF THE UNITED STATES

The United States is concerned about this case for three separate reasons:

1. If the decision below were to stand as a precedent for an award based on hypothetical power plant value, the power-consuming public and the Government of the United States would be seriously prejudiced. To compel a federal licensee to pay for assumed power-site value as a part of the cost of lands necessary to the project, as does the court below, is to put a serious practical obstacle in the way of disallowance by the Federal Power Commission of such hypothetical value as a part of the licensee's "net investment". Cf. *Niagara Falls Power Co.*, 73 P. U. R. N. S. 28. The allowance of such value means higher rates to consumers and greater cost to the United States for, under the Act, the "net investment"

of a licensee, based on its "actual legitimate original cost" (Section 3 (13), Appendix, *infra*, p. 72) has significance for rate making purposes (Section 20, Appendix, *infra*, pp. 79–81), and as a measure of the amount the United States, or a successor licensee (Section 15, Appendix, *infra*, pp. 76–77) is required to pay a licensee whose project is taken over at the expiration of its 50-year license. Section 14, Appendix, *infra*, pp. 75–76; see also Section 16, Appendix, *infra*, pp. 77–78.

2. The decision of this Court, should it reach the merits of the controversy, is likely to have a strong effect as a precedent in suits brought by the United States itself to condemn lands useful as a site for a hydroelectric project drawing power from the waters of a nonnavigable stream whose flow affects navigable waters. Cf. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273.

3. The United States holds approximately $14,000,000 worth of the petitioner's revenue bonds, the construction of the present project having been largely financed by the Federal Government under a loan and grant agreement (R. 105, 459, 565, 706).

SUMMARY OF ARGUMENT

I

The Supreme Court of Oklahoma held that respondents could recover "power site value"—value of the tract of land taken for possible future

use as a site for a dam for a hydroelectric project—only if the land might legally be used for this purpose. The court held that it could be so used without federal license, because such a license would not be necessary if downstream navigable capacity would not be affected. Also implicit in its judgment is the conclusion that such power site value is private property for which compensation must be made. Indeed the court held that that is recognized by the federal licensing provisions. We believe that, in so holding, the court committed one or more errors of federal law.

A. The power site value claimed by the respondent depends on a use of its land which is unlawful under the Federal Power Act. Section 23 (b) of the Federal Power Act prohibits use for power development, without federal permission, of any stream or part of a stream which, although non-navigable, is subject to the jurisdiction of Congress under the Commerce Clause. That the Grand River is such a stream is clearly established by legislative, administrative and judicial assertions and determinations. Development of water power from that river would, therefore, require federal permission obtainable under the Federal Power Act.

Grand-Hydro or its ordinary grantee could not obtain the federal permission granted by Section 23 (b) itself for water power developments satisfying the two prerequisites specified in that sec-

tion. One of the prerequisites is that no public lands or reservations will be affected. The project actually constructed by the Authority flooded numerous tracts of such lands and the Federal Power Commission and the Secretary of the Interior took the steps which were appropriate on that account in licensing that development. The other prerequisite is that the Commission shall not have found that the project would affect the interests of interstate or foreign commerce. Here again the Authority's project did not satisfy the prerequisite, for, upon the declaration of intention filed by the Authority, the Commission found the Authority's project would affect the interests of interstate commerce. The facts which made it impossible for the Authority to satisfy either prerequisite make it impossible that Grand-Hydro could have done so, because Grand-Hydro's contemplated development was substantially similar to the Authority's.

So also, the federal permission obtainable by license issued by the Federal Power Commission could not have been obtained by Grand-Hydro or its ordinary grantee at the time the lands were taken because of the conflicting license previously issued to the Authority. Nor could such permission have been obtained at any time after the Authority had applied for license (two and a half years before the taking) because of the preference accorded State agencies like the Authority, by Section 7 (a) of the Federal Power Act. And

because of that preference it had become increasingly improbable from the date the Authority was created (five years before the taking) that Grand-Hydro or its ordinary grantee could obtain a license.

B. Commencing with the River and Harbor Act of 1890, which was enacted before any substantial economic interests in hydroelectric power development could have arisen, federal statutes have prohibited any water power development affecting navigable waters of the United States, without special permission, whether or not the development itself was located in a navigable water of the United States. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 708.

As a result of these statutes, it is firmly established as to developments on navigable waters of the United States that power site value is in no sense private property. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 66, 69; *United States* v. *Willow River Power Company*, 324 U. S. 499; see *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 423, 427–428.

The same rule clearly applies where, although the project itself is not located in a navigable water, a navigable water of the United States is affected. *Willow River* case, *supra*, 324 U. S. 499. The federal regulations have the same effect in both cases and the authority of Congress is adequate to the needs in both. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525; cf. *Arizona* v. *California*,

283 U. S. 423. *United States* v. *Cress*, 243 U. S. 316, is inapplicable because the right to the use of the water, upon which the power site value depended, was not questioned in that case, and had apparently been exercised without let or hindrance for some time. Nor is the rule changed simply because, as here, some one other than the United States is the condemnor. The reason for the rule—that the individual landowner cannot, by reason of plenary federal control, realize on the value of his land as a power site—applies at least when the condemnor is a licensee of the United States condemning for a purpose authorized by the Federal Power Commission.

The federal licenses, by which permission is given for water power projects prohibited by the statutes referred to, do not recognize or allow private property rights in power site value. The terms prescribed for a license make the licensee the instrumentality of the United States to secure the public benefits from water power development which the United States itself might accomplish. The power site value here claimed is affected by, and basically dependent upon, anticipated revenues from operation of a water power development. Such revenues are contingent upon ability to sell the electric power generated at rates high enough to produce, after all operating expenses including depreciation and taxes have been provided for, a reasonable return on a base which includes power site value in addition to the full

amount otherwise invested. But such rates are prohibited under a federal license which limits the licensee's rate base to net investment and precludes allowance therein of any value for the license to use the water, and specifically provides that the net investment shall not "be affected by * * * prospective revenues." (Sections 19, 20, 14, 3 (13)).

Section 10 (e), prescribing a condition in the license upon which the court below relied, provides that the licensee, not the United States, shall be liable for any damages occasioned to "property" of others. It does not provide that such "property" includes power site value and there is no basis for any such implication.

The legislative history of the Federal Power Act, beginning with the Rainy and James River bill veto messages of President Theodore Roosevelt (Sen. Doc. No. 438, 60th Cong. 1st Sess., p. 3; H. Doc. No. 1350, 60th Cong. 2d Sess.) through the last major debate in Congress (56 Cong. Rec. 9037–9038, 9047), shows the intention of the proponents of that legislation not to recognize or permit private ownership of power site value. That intention prevailed, being carried into effect in the provisions of the Act which, by limiting rates to a return on net investment which excludes any value of the license and is unaffected by prospective revenues, effectively precludes private property in power site value. The practice of the

Federal Power Commission under the Act is consistent with the Congressional purpose.

II

The award of the court below, being based principally on power site value, is inescapably inconsistent with the view, heretofore advanced, that the federal law precludes any individual property interest in the value of land attributable to its usefulness as a site for a hydroelectric project developing power from a non-navigable stream in a way which will affect interstate commerce. Unless that view is entirely insubstantial, the contention that the award below is inconsistent with it raises a federal question bringing this case within the jurisdiction of this Court.

The respondent does not seem to contend otherwise. It limits its jurisdictional challenge to a contention that petitioner errs when its says that the court below has decided that the respondent could construct a hydroelectric project without a federal license. The Oklahoma court, according to the respondent, has simply held, as a matter of state law, that an owner of land adaptable to dam site use is entitled to compensation for the value of such use. While it may be that the court below did only refer to federal law in order to adopt it, by reference, as state law (cf. *Miller's Executors* v. *Swann,* 150 U. S. 132), we believe that a more accurate analysis of the opinions brings this within the class of cases in which "the

non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other * * *." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164. In such cases, this Court has jurisdiction.

ARGUMENT

Introduction.—While fully realizing that there is a question as to whether this Court can reach the merits of this controversy, we have thought it best, in the interests of clarity and lucid presentation, to relegate to Point II of the Argument a discussion of whether and to what extent a federal question is presented on this record. In Point I of the Argument, we discuss the merits of the decision below on the assumption, later to be analyzed, that the Supreme Court of Oklahoma has squarely rejected a claim to a "title, right, privilege or immunity * * * under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U. S. C. 1257 (3).

I

THE COURT BELOW ERRED IN HOLDING GRAND-HYDRO ENTITLED TO COMPENSATION FOR ANY POWER SITE VALUE OF THE LANDS TAKEN

We believe that an analysis of the two opinions of the Supreme Court of Oklahoma in this proceeding will demonstrate that that court committed an error of federal law when it concluded

that the respondent, Grand-Hydro, was entitled to be compensated for the power-site value of the lands which are here involved.[1]

In its first opinion, the court had said (R. 91):

> The condemnee is ordinarily entitled to compensation measured not only by the value of the land for the use to which he has applied it, but the value thereof for all possible purposes, present and prospective, to which he or his ordinary grantee might *legally*[2] apply the same.
>
> * * * * *
>
> * * * [This] rule for the measure of compensation * * * applies only to those adaptable uses to which the condemnee or his ordinary grantee may *lawfully* place the land [citing, *inter alia*, *United States* v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1), and *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53].

In the second opinion, saying that it would follow that rule as the "law of the case" (R. 674), the court accepted the Authority's contention that "if the taker is the only one who can use the land for a particular purpose, its value therefor is not an element in fixing market value." But the court refused to apply the rule here, holding that the use on which the claimed power-site value was based would not be unlawful (R. 675):

[1] The court recognized that the adaptability of the lands for power-site use had been the principal element considered in measuring compensation for their taking (R. 675).

[2] Emphasis supplied throughout this brief unless otherwise indicated.

> In all of the cases relied upon, the taker, inherently, was the only one who could use the property for the specific purpose, usually a governmental function, or the condemnee did not have the power of eminent domain necessary to acquire all the lands needed to use the tract for such purpose.
>
> In the case at bar the condemnor was, by legislative act, exclusively authorized to use the Grand River for hydroelectric power, but the use was in the nature of a business enterprise and the condemnee was also possessed of the power of eminent domain.

Similarly, it affirmed "the trial court's refusal to allow counsel to argue to the jury that the condemned land had no dam site value" due to "Grand-Hydro's lack of a permit from the Federal Power Commission" (R. 674), treating such lack of federal permission as not rendering use for water power development by the condemnee unlawful. It did so on two grounds (R. 676): First, that such use would not be subject to Federal Power Commission jurisdiction (and hence not illegal) if it would not affect navigability downstream. Second, that power site value, such as that claimed here, is private property for which compensation must be made and is so recognized by the federal licensing provisions.

As to both of these grounds we shall show that the court was in error and its conclusion erroneous.

A. EXISTENCE OF POWER SITE VALUE DEPENDS ON A USE OF THE LAND WHICH IS UNLAWFUL UNDER THE FEDERAL POWER ACT

The court below held that it had not been established that the requirement of a federal permit applied to a water power project on a nonnavigable stream such as the Grand River (R. 676):

> The [Federal Power] commission would have no authority whatever if the dam site were used for the construction of such a dam that the navigability of the Arkansas River would not be affected.

Clearly implicit is the assumption that unless and until such effect on a navigable water of the United States such as the Arkansas River is affirmatively established, the use is lawful and could give rise to power site value. In this the court misconceived the scope not only of the Federal Power Commission's authority but also of the Federal Power Act's requirement of federal permission. For that Act clearly prohibits any water power development on such a stream without federal permission, and so conditions the grant of that permission that, under the circumstances here disclosed, Grand-Hydro or its ordinary grantee could not lawfully have used the lands for the power development its witnesses contemplated.

1. *Section 23 (b) of the Federal Power Act prohibits such use without federal permission.*— Section 23 (b) of the Federal Power Act (16 U. S. C. 817) requires that "any person, * * *

State, or municipality intending to construct a dam or other project works * * * in any stream or part thereof, *other* than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce * * * shall before such construction file declaration of such intention with the Commission * * *." The Federal Power Commission is directed to make an immediate investigation and if it does not find "that the interests of interstate or foreign commerce would be affected by such proposed construction * * * and if no public lands or reservations are affected, permission is hereby granted to construct such dam * * * upon compliance with State laws." But if the Commission does so find, a license must be obtained from the Commission. Thus the first question in determining the applicability of federal requirements is whether the Grand River or the part thereof here involved, although nonnavigable,[3] is one "over which Congress has jurisdiction under its authority to regulate commerce," not whether the particular project affects downstream navigable capacity. If it is a stream subject to the jurisdiction of Congress, Section 23 (b) makes mandatory the filing of a declaration of intention to construct the project. *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S.

[3] It has been so treated throughout this case and by the Federal Power Commission when it granted the Authority a license in 1939 (R. 462, 476–477, 486).

152, 72, n. 17; *Georgia Power Co. v. Federal Power Commission*, 152 F. 2d 908, 913.

That the part of the Grand River here involved is one over which Congress has jurisdiction within the meaning of Section 23 (b) appears from numerous reports to Congress, federal statutes, filings of declarations of intention with the Commission, and Commission determinations upon such declarations, as well as from court adjudication of the precise question.

After a report by the War Department upon the Arkansas River and its tribitaries, including the Grand River, in 1935 (H. Doc. No. 308, 74th Cong. 1st Sess.), and after a survey of the Pensacola project by the National Resources Board in 1936 (R. 448–451, 145–161), Congress, in 1936, authorized the Chief of Engineers to survey and report on the Pensacola, Markham Ferry, and Fort Gibson reservoir sites on the Grand River. Flood Control Act of June 22, 1936, 49 Stat. 1570, 1596.[4] On January 12, 1939 (H. Doc. No. 107,

[4] It is stated in the report of the Secretary of War for the year 1870 (H. Doc. 295, 41st Cong. 2d Sess.) at page 7 thereof, that the "Grand or Neosho River is navigable for sixty or eighty miles for small steamers, but the short duration of the flood renders navigation uncertain. The current is rapid and requires more power to overcome it than the small steamers usually possess. Lead miners on the river offer high prices to induce steamboat men to make the venture."

The Pensacola dam site involved here is 77 miles from the mouth of Grand River. The downstream Markham Ferry and Fort Gibson sites are located 46 and 8 miles, respectively, above the river's mouth (H. Doc. No. 107, 76th Cong. 1st Sess., p. 2, R. 163).

76th Cong. 1st Sess.); the Chief of Engineers reported that the need for controlling flood flows of the Grand River, one of the principal flood-producing tributaries of the Arkansas River, made it advisable to construct one of the reservoirs at an early date, and recommended (page 6), that the three developments "should be constructed and operated as one coordinated unit in the combined interests of flood control and power development," and that "the project as a whole should be under Federal control" to insure operation that would not prejudice either of these interests (R. 167). Construction of the recommended developments was authorized by the Flood Control Act approved August 18, 1941 (55 Stat. 638, 645). When the Pensacola development was subsequently constructed by the petitioner under license issued by the Federal Power Commission, the license reserved the top ten feet, vertically, of the pool for flood control uses (R. 470), the United States condemning flowage rights so that the dam might be used for this purpose. *United States* v. *Oklahoma*, 168 F. 2d 858 (C. C. A. 10). The Chief of Engineers is proceeding with the construction of the remainder of this comprehensive project (Act of July 24, 1946, 60 Stat. 634, 635–636; and Public Law 296, 80th Cong. 1st Sess., approved July 31, 1947).

Two declarations of intention, filed to construct substantially similar projects on the Grand River

at the site now occupied by petitioner's Pensacola Dam, have required Commission consideration of this question. The first was in 1921 (H. Doc. No. 242, 67th Cong. 2d Sess., Federal Power Commission, First Annual Report, 1921, p. 123) by Grand River Hydro Electric Co., named as one of the respondents by the complaint in this proceeding (R. 31, 38, 39–40). The second was in 1937 and 1938 by petitioner (R. 485–486). In each instance, the Commission caused an investigation to be made and, taking jurisdiction, found that the interests of interstate commerce would be affected by the proposed construction, in the first because "any reduction in the normal discharge of the Grand River, a tributary of the Arkansas River, would impair the navigability of the Arkansas River" (H. Doc. No. 242, *supra*, p. 123), and, in the second, because "the construction and operation of said project as proposed by the declarant will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary" (R. 486).

The precise question here under consideration, whether the Grand River at the Pensacola site is subject to the jurisdiction of Congress, has been adjudicated by the United States District Court for the Northern District of Oklahoma. It arose in a condemnation proceeding brought by the Authority in which the jurisdiction of the Federal Power Commission to issue a license for the Authority's Pensacola project was challenged and

federal jurisdiction over the Grand River was quesfioned. The court found the Grand River to be nonnavigable, but, adopting findings of the three courts in *Brewer-Elliott Oil & Gas Company* v. *United States*, 260 U. S. 77, recognized the navigability of the Arkansas River from its confluence with the Grand River and held the Grand River to be subject to the jurisdiction of Congress as a necessary tributary of the Arkansas River. *Grand River Dam Authority* v. *Going*, 29 F. Supp. 316, 325.[5]

The federal jurisdiction over the river was recognized by the evidence relied upon by respondent to show adaptability of the land for a power development. Shortly after Grand-Hydro was organized in 1929 (R. 114–118), it employed the Fargo Engineering Company to report on the feasibility of hydroelectric development (R. 119–120, 391–445); this report was referred to Mead and Seastone, who made a supplemental report (R. 254–269). H. L. Freund, who testified at length for Grand-Hydro concerning preparation of the report (R. 240–312), stated that, in connection with it, he took a trip to Memphis, Tennessee, to consult the District Engineer. The

[5] A report of the Army Engineers stated (R. 170) that sometime between 1929 and 1932, the Grand River Power Co. applied for a federal permit but was advised that the proposed project did not fall within the scope of the Federal Power Commission's jurisdiction. A search of the records of the Commission and of the Army Engineers has failed to disclose any such finding or ruling by the Commission.

purpose of this trip was explained as follows (R. 267):

> The Grand River is a tributary of the Arkansas, and the Arkansas was a tributary of the Mississippi, and as such, this whole water shed at this time came under the jurisdiction of the government engineers, United States Army, and we went down to see the district engineer about the question of Grand River being a navigable stream, and to what extent it would be affected by general regulations. We wanted his opinion as to necessary steps that we might have to take in so far as the army regulations or the government regulations, were concerned.

Other evidence relied upon by Grand-Hydro included the reports made by the War Department in 1935 (R. 174–178, 448–451); the National Resources Board in 1935 (R. 145–161, 589–590); and the War Department in 1939 (R. 162–174, 452–456, 557–558). See *supra*, pp. 21–22. Grand Hydro's own evidence, therefore, confirms the conclusion that the Grand River is subject to the jurisdiction of Congress.

2. *The Section 23 (b) statutory permission effective upon a Commission finding may not be assumed to be obtainable under the facts of this case.*—Since the Grand River is a stream subject to the jurisdiction of Congress under the commerce power, Grand-Hydro or its ordinary grantee was required to file a declaration of intention under Section 23 (b) and thereupon might

obtain permission for its proposed project in one of two ways, depending upon the finding the Commission made. Section 23 (b), of its own force, grants permission to construct the project if two prerequisites are satisfied: (1) if the Commission does not find that the interests of interstate or foreign commerce would be affected and (2) if no public lands or reservations would be affected. Otherwise, a license must be obtained. Under the circumstances of this case, as we shall show, Grand-Hydro or its ordinary grantee could not satisfy either of the prerequisites to the statutory permission.

We must, on this record, start with the fact that Grand-Hydro or its ordinary grantee, would be proposing a project substantially similar to that constructed by the Authority. For such was the project assumed by Grand-Hydro's valuation witnesses in making their estimates of power site value. See *supra*, p. 6. The substantial similarity is shown by the approximate equivalence in height of the two dams located at the same site (the factor physically determining capacity to alter natural stream flows) and the express conclusion of one of Grand-Hydro's experts as to the similarity. The height of the Authority's dam is shown, by the order authorizing issuance of the license, to be 147 feet (R. 476), while the dams contemplated by Grand-Hydro's experts upon whose estimates the award was based, were approximately 150 feet, creating static heads of

approximately 125 feet (R. 336–337, 348, 366). And it was Grand-Hydro's expert Justin who testified as follows (R. 335):

> Q. * * * Is your valuation of this dam site based upon its being used for a project similar to the one the Grand River Dam Authority has constructed there?
>
> A. Not entirely similar, but with regard to its use, it would be similar.
>
> Q. That is a project that would produce the same amount of electricity that they would produce?
>
> A. A little more than that site.

We return then to the question of whether the statutory permission provided by Section 23 (b) is available in the circumstances of this case. One prerequisite to that permission, as already stated (*supra*, p. 26), is that "no public lands or reservations[8] are affected." The record discloses that the Authority's project flooded hundreds of acres of Indian lands, including tribal lands and lands held by the United States in trust for Indians (R. 523–524, 528). It establishes also that the

[8] Section 3 (2) of the Federal Power Act defines "reservations" as follows:

> "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

Commission, when it authorized the Authority's license, found that the "proposed project will affect certain Indian tribal lands and possibly lands of the United States" (R. 476) and provided for annual charges to be levied on account of the use of lands of the United States and Indian tribal lands within the project area (R. 480). Furthermore, the authorization was given only upon conditions reported to be satisfactory by the Secretary of the Interior (R. 477), pursuant to the statutory requirement which applies only where "reservations" are affected (Federal Power Act, Section 4 (e), 16 U. S. C. 797 (e).

The other condition fixed in Section 23 (b) is that the Commission, after investigation, shall not have found that the interests of interstate or foreign commerce will be affected. The record shows that the Commission, after investigation, upon the declaration of intention filed by the Authority, found that the development which it proposed and which was substantially similar to that later constructed by it under its license (R. 476), would affect the interests of interstate commerce as already pointed out (*supra*, pp. 5, 23). Furthermore, in authorizing that license, the Commission found that the "project is desirable and justified in the public interest for the purpose of * * * developing the Grand River and the Arkansas River to which it is tributary for the use or benefit of interstate commerce" (R. 477), pursuant to statu-

tory provision for such a finding (Federal Power Act, Section 4 (e); 16 U. S. C. 797 (e)). And the authorization provided that the operation of the project generally should be subject to the control of the Secretary of War in the interests of navigation and flood control, and specifically that the storage capacity of the top ten feet of the reservoir should be reserved and utilized for the control of floods (R. 482–483). It follows that the facts which made it impossible for the Authority to satisfy the prerequisites to satutory permission likewise made it impossible for Grand-Hydro to do so because, as has been shown (*supra*, pp. 26–27), Grand-Hydro's contemplated project was substantially similar to that of the Authority.

3. *Federal permission through license may not be assumed to be obtainable.*—Obviously, no conflicting license could have been obtained by Grand-Hydro or its ordinary grantee after issuance of the Authority's license on July 26, 1939 (R. 475), six months before the taking date (R. 673). But even before that, permission for the water power development on which its claimed power site value depended could not have been obtained through a license, because of the provisions of the Federal Power Act giving preference to municipalities. Section 7 of that Act (16 U. S. C. 800), requires the Commission to give preference to states and municipalities in the issuance of preliminary permits and licenses, provided their plans are deemed equally well adapted to conserve and utilize in the

public interest the water resources of the region. "Municipality" is defined to include a "city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." Section 3 (7) (16 U. S. C. 796, 41 Stat. 1063). The Authority is clearly a "municipality" under this definition and as such entitled to the preference over Grand-Hydro or its ordinary grantee. Okla. Laws 1935, c. 70, as amended, Okla. Stat. 1941, Title 82, Secs. 861–881 (see R. 89, 105, 672). Hence, from the time of the Authority's creation in 1935 (R. 89, 105, 672), its potential right to preference, particularly after 1937, when it filed its declaration of intention (R. 485), and its actual right to preference from the filing of its application for license in 1938 (R. 104), made it increasingly improbable that Grand-Hydro could have obtained a license during the five years preceding the taking.[7]

---

[7] Even if the Authority or some other municipality had not been in the picture, Grand-Hydro would not have been entitled as of right to a license without compliance with, and satisfaction of, all of the requirements and conditions of the Act, and not at all if, in the judgment of the Commission, the development should be undertaken by the United States itself. Section 7 (b) (16 U. S. C. 800 (b)). Compare the Commission's finding in authorizing the Authority's license that its issuance (with the flood control provisions) would not affect * * * the development of any water power resources for public purposes which should be undertaken by the United States itself (R. 477).

We submit, therefore, that the contemplated use of the waters of the Grand River by Grand-Hydro or its ordinary grantee for the development of power was not properly held lawful by the court below on the ground that it might not be subject to the jurisdiction of the Federal Power Commission, such use being entirely prohibited under the provisions of the federal act.

B. POWER SITE VALUE BASED ON A HYPOTHETICAL DEVELOPMENT REQUIRING FEDERAL LICENSE IS NOT A COMPENSABLE PRIVATE PROPERTY INTEREST

The Oklahoma Supreme Court's alternative ground for overruling petitioner's contentions under the Federal Power Act was that a licensee under the terms of that Act is required to compensate for power site value of lands taken (R. 676):

> Although the Authority had been granted a license by the Federal Power Commission granting it the exclusive right to use the 417 acre tract as a dam site, it could not thereby take private property without just compensation. Nor was the issuance of such license intended to have that effect because the plain provision requires the licensee to pay all damages to the property of others caused by the construction, operation and maintenance of the project.[8]

[8] The provision referred to presumably is that part of Section 10, reading as follows:

> All licenses issued under this Part shall be on the following conditions:
>
> (c) * * * Each licensee hereunder shall be liable for all damages occasioned to the property of others by

In this the court assumed without discussion the answer to the question to be decided, i. e., that the claimed power site value was the "property" of Grand-Hydro. As this Court said in *United States* v. *Willow River Co.*, 324 U. S. 499, 502:

> * * * not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law has long recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute "property rights" in water hovers over a given piece of shore land; good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really the question to be answered.

1. *There is no private property right in the use of water for power purposes where such use affects navigable waters of the United States.*— Beginning with the River and Harbor Act of 1890, enacted before any substantial economic interests

---

the construction, maintenance, or operation of the project works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

in hydroelectric power development could have arisen,[9] and including the last amendment of the Federal Water Power Act in 1935, federal statutes have prohibited development of power by any use of water that affects navigable capacity of any navigable water of the United States, without special permission. This has been true of power projects on nonnavigable waters like the Grand River, as well as on navigable waters of the United States. Their effect has been to make the existence of private property in any power site values entirely dependent upon the terms of the special permission extended. A brief reference to the statutes, followed by an analysis of the cases involving power site value, will make this plain.

Section 7 of the River and Harbor Act of 1890 (26 Stat. 426, 454), prohibiting construction of dams without approval by the Secretary of War, was limited to navigable waters of the United States, but Section 10 of that Act prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction * * *." The latter prohibition applies to dams or other causes of obstruction

[9] Kerwin, *Federal Water Power Legislation*, p. 106, note 1, says that the first hydroelectric power development was constructed in 1890. Rushmore and Loft, *Hydro Electric Power Stations* (1923), p. 7, refer to the building of the first hydroelectric central station at Appleton, Wisconsin, in the year 1882 and the first alternating current hydroelectric station in 1889 at Oregon City by the Willamette Power Company.

to navigable capacity, and not merely obstructions to navigation, and does so irrespective of whether the dam is located in a navigable water of the United States or not. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 708.

In 1899, Congress enacted the River and Harbor Act of that year imposing broader prohibitions on dams and obstructions and additional requirements, including a requirement for special Congressional authorization (30 Stat. 1151, March 3, 1899, §§ 9, 10). Here, similarly, while Section 9 made it unlawful to construct a dam in any navigable water of the United States until the consent of Congress shall have been obtained and the plans approved by the Chief of Engineers and the Secretary of War,[10] Section 10 prohibited any obstruction not affirmatively authorized by Congress "to the navigable capacity of any of the waters of the United States" and did so, again, regardless of whether the dam or other cause of obstruction was located in a navigable water of the United States or not. Appendix, *infra*, p. 72.

The next twenty years offered convincing demonstration of the nonexistence of power site values subject to private ownership in any of the waters, navigable or nonnavigable, within the ambit of these statutory interdictions. The in-

[10] Authorization by a state legislature and approval of location and plans by the Chief of Engineers and the Secretary of War was made sufficient where the navigable part of the waterway lies wholly within a single state.

creasing number of applications for the special Congressional consent to hydroelectric developments made necessary by the River and Harbor Acts led, in 1906, to the enactment of the General Dam Act of that year (34 Stat. 386). That Act fixed conditions which would apply to each project which should thereafter be authorized by special act of Congress. Kerwin, *Federal Water Power Legislation*, p. 111. Twenty-five such special acts were enacted under that Act, but only six of the authorized projects were completed. Report, House Committee on Water Power, No. 61, 66th Cong., 1st Sess., June 24, 1919, p. 3. A similar act setting up more conditions, the General Dam Act of 1910 (36 Stat. 593), was followed by fourteen special acts. Only two of those projects were completed. The eight projects completed under both acts aggregated 140,000 horsepower, a relatively inconsequential amount. *Op. cit.* It was this practical condition, i. e., that the prohibitions of the River and Harbor Acts and requirement of Congressional consent were blocking the development of the water power resources of the country, that led to the enactment of the Federal Water Power Act of 1920. *Ibid*, pp. 3–5; Report, Senate Committee on Commerce, No. 180, 66th Cong., 1st Sess., p. 3. *Cf. First Iowa Coop.* v. *Power Comm'n*, 328 U. S. 152, 180.

That Act was principally a provision of methods for obtaining federal permission for otherwise

prohibited water power developments, but it contained a further prohibition of its own against unlicensed construction, operation, or maintenance of any project, on a stream other than a navigable water but subject to the jurisdiction of Congress under the commerce power. That prohibition was to become effective whenever, upon a voluntarily filed declaration of intention, the Commission should find that a proposed project would affect the interests of interstate or foreign commerce. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 399.

In 1935, the Federal Water Power Act was amended to incorporate its own additional prohibition against unlicensed or otherwise federally unauthorized construction, operation, or maintenance of hydroelectric developments on navigable waters (49 Stat. 846, Sec. 210) and to incorporate a requirement already referred to (*supra*, pp. 19–21), making mandatory instead of permissive the filing of declarations of intention for proposed projects on nonnavigable waters. It also carried forward the prohibition in the 1920 Act of federally unauthorized construction, operation, or maintenance of such projects where the Commission has found the interests of interstate or foreign commerce will be affected. With this amendment, the prohibition of water power developments on nonnavigable waters, where the interests of interstate or foreign commerce will be affected, without special federal permission, was made as complete as it

had previously been for development on navigable waters, so that enforcement of the federal restriction would not have to wait for operation of the project to create, or threaten to create, an obstruction, but applied to a proposed project capable of such operation.

As a result of these federal statutory provisions, repeated decisions have firmly established the rule that there cannot be a private property interest in any power site value of lands due to their strategic location for the development of power from the fall of water of a navigable river of the United States, because there is no legal right to the realization of any such value. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 66, 69; *United States* v. *Willow River Power Company*, 324 U. S. 499; *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. C. A. 9), certiorari denied, 320 U. S. 747; *Continental Land Co.* v. *United States*, 88 F. 2d 104 (C. C. A. 9), certiorari denied, 302 U. S. 715; see *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 423, 427–428.[11]

The *Chandler-Dunbar* case was a condemnation proceeding by the United States under an act of Congress for the improvement of the St. Mary's River at Sault Ste. Marie (35 Stat. 815, March 3, 1909). The condemnee owned the upland and adjacent river bed to the thread of the stream upon which it had erected structures for hydroelectric

[11] But compare special situations like that which arose in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

power development under revocable permits issued by the Secretary of War under the River and Harbor Act of 1890 (*supra*, 229 U. S. 53, 68). Its permits were later revoked and its land condemned under the 1909 Act. It contended that under the provisions of the condemnation statute it was entitled to compensation for the value of water power rights. In the court below it had received an award which included $550,000 for undeveloped water power which could be produced by water not needed for supposed requirements of navigation. Before this Court, the Government objected to any allowance for such power site value, while the company contended it should have received $3,450,000.

This Court held that the court below had "erred in awarding $550,000, or any other sum for the value of what is called 'raw water', that is the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land" (p. 74) on the ground, simply (pp. 69–70):

> * * * that the running water in a great navigable stream is capable of private ownership is inconceivable.
>
> Whatever substantial private property rights exist in the flow of the stream must come from some right which the company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. * * *

> But every such structure in the water of a navigable river is subject to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river. * * * It is for Congress to decide what is and what is not an obstruction to navigation.

In *United States* v. *Appalachian Electric Co.*, 311 U. S. 377, this Court relied on the Chandler-Dunbar decision in sustaining the licensing provisions of the Power Act (311 U. S. 377, 424, *et seq.*). Upholding the constitutionality of the provision for acquisition by the Government at the end of the license term upon payment of a price which does not include power site value, the Court said (311 U. S. at pp. 427–428):

> It has been shown [referring to a note citing the *Chandler-Dunbar* case and *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 330] that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that by compulsion of the method of acquisition provided in § 14 of the Power Act and the tendered

> license, these riparian rights may pass to the United States for less than their value. In our view, this "is the price which [respondents] may pay to secure the right to maintain their dam." * * * Since the United States might erect a structure in these waters itself, even one equipped for electrical generation, it may constitutionally acquire one already built.
>
> Such an acquisition or such an option to acquire is not an invasion of the sovereignty of a state.

In *United States* v. *Willow River Power Co.*, 324 U. S. 499, setting aside an award of $25,000 against the United States by the Court of Claims for loss of power value to the company's hydroelectric project caused by a navigation dam which raised the level of the St. Croix River three feet above the natural high water mark, this Court relied on the *Chandler-Dunbar* and *Appalachian Electric* cases in holding (324 U. S. 499, at 509, 511) "that claimant's interest or advantage in the high-water level of the St. Croix River is a run-off for tail waters to maintain its power head is not a right protected by law and that the award below based exclusively on the loss in value thereof must be reversed."

We believe that these decisions and their supporting rationale lead to the conclusion that the same is true of the development of power from the fall of nonnavigable waters if a navigable

water of the United States is affected and, accordingly, that the respondent here had no property right in power-site value. Thus, the power site value (economic advantage) claimed to be a property right in the *Willow River* case, like that in the present case, was the value of the use of the fall of the water of a nonnavigable stream, falling outside the limits of any navigable water of the United States. Although in that case the fall was not in a navigable water of the United States, the Federal Government, in the exercise of its powers to regulate commerce, had so regulated the flow of the navigable water into which the falling water subsequently flowed as to prevent use of part of the fall. The Court there held that the enjoyment of the economic value of that use was not a right protected by law, not a property right, and the loss thereof not compensable.

So here the Federal Government, in the exercise of its powers to regulate commerce, has regulated the flow of the navigable water into which the water falling at the Pensacola site subsequently flows, in such a way as to prevent use of that fall for development of power, except as permission shall be specially granted, and then subject to the terms of such permission. The federal regulation of the St. Croix River was by the Government's own construction physically affecting water levels; federal regulation of the Arkansas River is by legal rules governing actions capable of affecting water levels. But the distinction is not

important. By physical action in one case, by statute in the other, the Federal Government has limited the use of falling water so as to preclude realization of economic value therefrom.

The same conclusion follows if we consider the question from the practical viewpoint of the sufficiency of the power of Congress to protect and improve navigable capacities of navigable waters of the United States in this era of comprehensive river basin development. See *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525. Surely alteration of the water level of the Arkansas River by the operation of a project at Pensacola is no less subject to the regulatory power of Congress than the same alteration would be if caused by a project physically located on the Arkansas River itself. It follows that the economic advantage to Grand-Hydro of being free so to alter that flow is no more its private property right when its project is located on a nonnavigable water than when it is located on the navigable water itself. The language of the *Willow River* opinion is as applicable to the property rights in power site value claimed here as to those claimed there (324 U. S. at 510):

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Gov-

> ernment in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.
>
> Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property. Cf. *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *Wheeler,* 179 U. S. 141; *Bedford* v. *United States,* 192 U. S. 217; *Jackson* v. *United States,* 230 U. S. 1; *Hughes* v. *United States,* 230 U. S. 24; *Cubbins* v. *Mississippi River Commission,* 241 U. S. 351. Such losses may be compensated by legislative authority, not by force of the Constitution alone.

Here, as in that case, the water use upon which the claimed value is based is in conflict with the federal protection and improvement of the navigable capacity of a navigable river into which the water flows. It follows that a claim for power site value can no more prevail here than in the *Willow River* case; that power values in the use of the fall of nonnavigable, no less than the fall of navigable, waters of the United States are dependent upon federal regulations enacted for the protection and improvement of navigable

capacity of navigable waters of the United States where the proposed use affects interests of interstate commerce.

This is confirmed by the rationale of the decisions as to power values in navigable waters of the United States. Thus, while the opinion in the *Chandler-Dunbar* case expressly set aside the question of the rights of riparian owners on non-navigable streams from the question there decided with respect to navigable waters of the United States, it did so with explicit qualifications which show that a public interest in the effect on downstream navigable capacity such as is here involved would overcome the distinction and bring this case within the scope of the reasoning there (229 U. S. at pp. 69–70):

> We may put out of vie altogether the class of cases which deal with the right of riparian owners upon a non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power *may be* a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but *if* the effect was not injurious to the property of those above or to the equal rights of those below, none could complain, *since no public interest would be affected.*

Again, in the portion of the *Appalachian Electric* case quoted above (*supra*, p. 40), this Court supports federal jurisdiction to impose licensing re-

quirements on a hydroelectric project by pointing out that the United States might constitutionally construct the project itself. By that test, the development of the Grand River at Pensacola is clearly within the scope of the constitutional power of Congress, under the decision of this Court upholding the power of Congress to construct the Denison Dam in the nonnavigable Red River in Oklahoma under analagous circumstances. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508; cf. *Arizona* v. *California*, 283 U. S. 423.

United States v. *Cress*, 243 U. S. 316, is inapplicable because no question was there raised as to the lawfulness under the federal statutes here referred to of the use of the fall of the water of the nonnavigable stream for which compensation was there awarded, and that use was an actual and established use apparently carried on for some time past without let or hindrance. This Court has said more than once that the doctrine of the *Cress* case "must be confined to the facts there disclosed." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 597; *Willow River* case, *supra*, 324 U. S. 499, at 507. However, if it be deemed opposed, it should now be modified.

It is of no legal consequence, moreover, that the condemnor in this case is not the United States as it was in the cases just discussed. In the *Chandler-Dunbar* case, the Court said that "Whatever substantial private property rights exist in the flow of the stream must come from some right which that

company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. * * * Congress has of course excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of navigation." 229 U. S. at 69, 71–72. That rationale, leading to the conclusion that there is no private property or compensable interest in water rights, permits of no distinction of the instant case on the ground that the condemnor is not the United States but one of its licensees. For in this case, just as in *Chandler-Dunbar* and the others, the respondent has no right to construct and maintain those structures which are "essential to the utilization of the power of the stream for commercial purposes." See *supra*, pp. 38–39). Having no such right, it cannot insist on being compensated for its deprivation.

To accept the view advanced above is not to hold that in every case in which property can be put to certain advantageous uses only after governmental permission is secured, the possibility of such use cannot enter into market value and into a determination of just compensation. Real estate best utilized as the site of an office building need not be valued as agricultural land simply because a building permit must first be obtained. In such a case, the likelihood of obtaining such a permit would be relevant to a determination of

value; the need for a permit would not, however, foreclose inclusion of the value of the land as a building site.

In the case of water power derived either from a navigable water or a non-navigable water the proposed change in whose flow affects a navigable water, the rule is different because Congress has made it so as shown in the decisions of this Court just discussed. And as we shall show in the discussion to follow, Congress has explicitly provided, in the Federal Power Act, that a licensee is not to have a property right in any value of ripairian land attributable to its usefulness as a dam site. Much less may there be such a property right in one whose proposed project, like Grand-Hydro's, is not only unlicensed but the construction of which is foreclosed by the existence of an outstanding license for the project in another, the Authority.[12]

2. *The federal licensing provisions do not recognize or allow private property rights in power site value.*—Power site value as here claimed is not recognized by the licensing provisions of the Federal Power Act and its allow-

[12] We need not consider, in this case, whether there may be such a property right in the owner of a dam site on a non-navigable stream when, though the stream is subject to Congressional jurisdiction, the project does not affect interstate commerce and need not be licensed by the Commission. See *supra*, p. 26. For the project here contemplated by Grand-Hydro's valuation witnesses would have required a Commission license. See *supra*, pp. 19-29.

ance is prevented in accordance with the persistently advocated purpose of the proponents of the original 1920 Federal Water Power Act. That purpose was to encourage and utilize private enterprise to develop the nation's water resources under carefully prescribed license conditions which would secure to the public the benefits which development by the United States itself might produce. The licensee becomes in reality an instrumentality of the United States. Cf. *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 616 (M. D. Ala.), characterizing the licensee as the agency of the United States. In addition to being permitted to use the falling water for power development prohibited to others, it is permitted to occupy public lands for that purpose (Section 4 (e), 16 U. S. C. 797 (e)); permitted to exercise the right of eminent domain (Section 21, 16 U. S. C. 814); entitled to payment for headwater benefits it contributes to downstream projects (Section 10 (f), 16 U. S. C. 803 (f)); given a fixed tenure and right to reimbursement for its net investment not in excess of fair value at the end of the term of its license; and protected against any alteration, amendment, or repeal of its rights under its license (Section 28, 16 U. S. C. 822). On the other hand it must comply with conditions for the protection and utilization of any reservation involved; its plans affecting navigation must be approved by the Chief of Engineers and the Secretary of War and be

adapted to conserve and utilize in the public interest the water resources of the region; it may not voluntarily transfer its license without written approval of the Commission; its project must be one best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and other beneficial public uses, including recreational purposes, and it must submit to comprehensive regulation of its operations and procedures, including rate regulation (Sections 4 (b), 4 (e), 6, 7, 8, 10, 11, 12, 13, 16, 18, 19, 20, 22, 301, 302, 304). Provision is made for it to undertake, or share, or permit the United States to undertake, to construct and operate navigation facilities at the project (Section 11). Without further enumeration of its rights and obligations (cf. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 420, note 65) enough has been indicated to show that when a licensee undertakes to acquire land needed for the project, it stands in the same position the United States would if it had undertaken to construct the project itself.[13] In order to provide the public benefit of cheap power

[13] Otherwise, in the case of a project like the Pensacola project where the United States is acquiring by condemnation the part of the lands required for the top five feet of the reservoir, the anomalous result would be that two different rules would apply for measuring compensation.

which government construction and operation might provide, the licensee is not permitted to realize on power site values from its operation of the project. By the same token, no one else can realize on such values and so no power site value can come into existence for the licensee to pay for. Consideration of the nature of the power site value claimed, the terms of the license conditions, the legislative history of the Act and its administrative interpretation makes this clear.

The testimony of Grand-Hydro's experts shows that their estimates of power site value were affected by anticipated revenues from the hypothetical water power projects they assumed could be built. Thus Grand-Hydro's witness Justin admitted he was not an expert on land value (R. 329), and its witness Creager stated that his method of valuation was not peculiar to a dam site located in Oklahoma (R. 361). All of its expert witnesses were consulting engineers (R. 313, 341, 354, 374). Its witness Creager explained (R. 360) that the power site value was based on the assumption that a purchaser "could afford to pay a considerable sum for this site and develop it in supplying the market in preference to any other method for supplying that market." His further explanation (R. 360) showed that essentially such "considerable sum" was a capitalization of the economic advantage of hydroelectric production of power at the contemplated development over production by

an alternative steam electric generating plant. Another expert witness, Norton, testified that he had given "very careful consideration" to possible revenues from the project (R. 383–384). The importance of anticipated revenues appears from the report of the Fargo Engineering Company, which was relied upon by Grand-Hydro's experts (R. 359, 385). After estimating power output, that report analyzes at length net returns based upon various assumptions as to amount of power that would be sold and the rates received therefor (R. 395–398). It is plain, therefore, that the valuations of the experts were largely affected by anticipated revenues. It is likewise clear that the existence of the claimed power site value is dependent upon the ability of the contemplated water power development to produce revenues providing a reasonable return on that value, in addition to a return on the amount otherwise invested, over and above all operating expenses, including taxes and depreciation. The assumed revenues are, of course, those to be derived from sales of project power. But those sales must be made at such rates not only as the market will support but as the law will allow. The record shows that Grand-Hydro's experts treated federal licensing requirements as not affecting their estimates (R. 319, 334, 345, 361, 371, 378). Thus their estimates of power site value failed to take into account any restrictions in licensing provisions preventing the charging of rates sufficient to pro-

duce the added return necessary to support the power site value.

The licensing provisions of the Federal Power Act make it plain that any license which could have been issued would have prevented Grand-Hydro, or any one else in its position, from charging such rates. Sections 19 and 20 of the Act provide for comprehensive regulation of licensees' rates and conclude with this important provision:

> In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States * * * and no value shall be claimed or allowed for the rights granted by the commission or by this Act.[14]

The maximum rate base thus prescribed by reference to Section 14 is, in general, net investment (see definition in Section 3 (13)). However, Section 14 expressly provides:

---

[14] The significance of the inclusion of a provision against a licensee claim of a higher value, in addition to the provision against commission allowance of a higher value, was that Sections 19 and 20 subject the licensees to state rate regulation where it is provided by the States and the Congressional purpose could best be achieved in such cases by a provision directed to the licensee.

> Such net investment shall not *include or be affected by* the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or *prospective revenues; nor shall the values allowed for* water rights,[15] rights-of-way, *lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee* * * *.

With its rates restricted to producing a return on net investment thus limited so as to prevent realization on any additional element of claimed value, it is plain that the entire basis of Grand-Hydro's claimed value is eliminated. The allowance of a value for land which is based principally upon its usefulness as a power site would simply bring into net investment, in the guise of cost of land, what Congress prohibited in Section 14.

Ignoring these provisions of the Federal Power Act, the court below relied on the license condition prescribed by Section 10 (c) of the Act as indicating that a licensee must pay for power site value of lands condemned for the project. That Section provides:

> All licenses issued under this Part shall be on the following conditions:

[15] *I. e.*, water rights under state irrigation laws or other state laws not regulating development of power, saved from supersedure by Section 27 of the Federal Power Act. See *infra*, p. 55.

* * * * *

(c) * * * Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

The provision was obviously intended simply to make clear that liability for damages was upon the licensee and not the United States, but assuming, *arguendo*, that it has any applicability to condemnation proceedings brought by the licensee, it does not expressly or by implication declare that power site value is a property right, and there is no basis for concluding that by such use of the word "property" Congress intended to set up a set of rights counter to the established body of federal law. The Section does not define "property of others," nor does it, of itself, impose an additional liability on the licensee. *Alabama Power Co.* v. *Smith*, 229 Ala. 105; *Louisville Hydro Electric Co.* v. *Coburn*, 270 Ky. 624. Cf. *Corrigan Transit Co.* v. *Sanitary Dist.*, 137 Fed. 851 (C. C. A. 7). The decision in *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, holding that a licensee operating a power project under the Federal Power Act was liable under Section 10 (e) for damages to upper power plants caused by a licensed project, is not controlling, because the right under federal law of the upper power de-

velopers to maintain their structures in the stream was not questioned in that case or considered by this Court or any of the lower courts. In the instant case, there is a challenge to the right of respondent to construct the hypothetical power project upon which the claimed values rest, without appropriate federal authority. For the same reason, Section 27 of the Act, *infra*, which provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

does not justify a payment of "power value." In *First Iowa Coop.* v. *Power Comm'n*, 328 U. S. 152, 175–176, this Court analyzed Section 27 and concluded that, as the court held in *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 619–620 (M. D. Ala.), the section related to water rights for irrigation, municipal, and similar purposes. That the section did not relate to power value is emphasized by the reference to "water rights" in Section 14 which, as we have shown, expressly excludes power value from net investment.

All of these provisions read together demonstrate an intention to preserve local rules as to

appropriation of water for irrigation etc., but an express denial of a property right to use the waters of streams under federal control for the purpose of developing hydroelectric power. The legislative history of the Act demonstrates that such was the intention of Congress.

In 1908, Theodore Roosevelt, in his Veto Message Relating to Extension of Time for Construction of Dam Across Rainy River (Sen. Doc. No. 438, 60th Cong. 1st Sess. p. 3), which may be regarded as the beginning of the direct movement leading ultimately to the enactment of the Federal Water Power Act, touched upon the subject, saying:

> The present policy pursued in making these grants [special acts of Congress authorizing hydroelectric developments] is unwise in giving away the property of the people in the flowing waters to individuals or organizations practically unknown and granting in perpetuity these valuable privileges in advance of the formulation of definite plans as to their use.

A year later, in his Veto Message Relating to the Building of a Dam Across the James River, Stone County, Missouri (H. Doc. No. 1350, 60th Cong. 2d Sess., pp. 5–6), President Roosevelt adverted to the same subject:

> Our water power alone, if fully developed and wisely used, is probably sufficient for our present transportation, industrial, municipal, and domestic needs. Most

of it is undeveloped and is still in national or state control.

To give away, without conditions, this, one of the greatest of our resources, would be an act of folly. If we are guilty of it; our children will be forced to pay an *annual return upon a capitalization based upon the highest prices which "the traffic will bear."* They will find themselves face to face with powerful interests intrenched behind the doctrine of "vested rights" and strengthened by every defense which money can buy and the ingenuity of able corporation lawyers can devise. Long before that time they may and very probably will have become a consolidated interest, controlled from the great financial centers, dictating the terms upon which the citizen can conduct his business or earn his livelihood, and not amenable to the wholesome check of local opinion.

Six years later, the House Committee on Public Lands, in reporting a bill to provide for the development of water power and the use of public lands in relation thereto, reflected the further development of the subject (H. Rep. No. 842, 63d Cong. 2d Sess., p. 10):

This bill is framed on the theory that water-power opportunities are in a certain sense the *property of all the people and should not be permitted to pass in perpetuity into private ownership* * * * on its *hurried* journey from the mountains to the lowlands, on its way back to the

> ocean, the law of gravitation gives this falling water tremendous energy, and tremendous industrial possibilities. These possibilities are not the result of human agency or intervention. They are the beneficent effect of the Creator's design for supplying the needs of all his children. Why, then, should one, or a few of them, be permitted to get perpetual possession of strategic locations when the energy of this falling water on its never-ending race from the mountains to the sea furnishes such marvelous opportunities for supplying the needs of humanity? It was intended for all; why disinhert the great majority, allow a few to monopolize such opportunities, and compel the others to pay tribute to them?

Two years later, the Senate Committee on Public Lands discussed the same problem (S. Rep. No. 66, 64th Cong. 1st Sess., p. 17). Pointing out that the value of public lands as power sites far exceeds their value for agricultural or any other purpose, it argued that the government should not give the sites away "because that would be unwise, unbusinesslike, and in derogation of the rights of the general public," and that it should not sell them because even if they could be sold at their real value the purchasers "would endeavor to secure return by imposing higher rates on the consumers, and in that case would doubtless be permitted to impose higher rates by public-service commissions, on the ground that it represented return upon

actual investments." To solve the dilemma it recommends that development be secured "under a plan which will be fair to the developer, the investor, the Government, and the consumer, by lease or permit for a definite period on conditions fully known in advance."

The last House hearings on the proposed legislation which was subsequently enacted into law as the Federal Water Power Act were held in 1918 by the Joint Water Power Committee. Mr. O. C. Merrill, of the Forest Service, Department of Agriculture, was the first witness, presenting the views of the Secretaries of War, Interior and Agriculture. Mr. Merrill had assisted in the preparation of the proposed substitute bill which was under consideration by the Committee (Water Power Hearings, House Committee on Water Power, 65th Cong. 2d Sess. (1919 Printing), pp. 8–9).

In connection with the recapture provisions, he referred to the definition of actual legitimate original cost as fixing the price to be paid by the Government and made it clear that the licensee (p. 81):

> * * * is not to get anything for increase in property value due to increase in value of land, or of water rights, and no intangible elements like good will franchise value; or expected profits * * *.

Again (p. 39):

> The net investment as so used eliminates entirely from the price to be paid any in-

creases in value due to lands owned by the licensee and used in connection with the license, any increases in value due to its water rights over and above what it may have paid to the local authorities for them. That is, "unearned increment," so called, is completely excluded from the price to be paid.

The Water Power bill (S. 1419) in virtually its final form was fully debated in the 65th Congress, failing of passage in the general filibuster which marked the end of the last session of that Congress. The same bill, word for word, was introduced in the 66th Congress, as H. R. 3184, and adopted without much debate. In the 65th Congress the debate, on July 12, 1918, returned again to the much bruited question of the federal power to impose annual charges, and in this connection the explanation in support of the provisions ultimately enacted into law confirms the view that Congress did not recognize private ownership of power site values (56 Cong. Rec. 9037–9038, 9047):

Mr. ALMON. I would be glad to have the chairman give his views on the question whether he thinks the National Government has any interest and should be paid for the use of water on navigable streams where the navigation dams are put in by private capital with the permission of the United States or the War Department.

Mr. SIMS. I have very positive views on that question and I do not hesitate to give them. Private capital is doing whatever

it does do as the agent of the Government of the United States. There is no question that if the Government constructs a dam for navigation purposes and water power results from such Government expenditure that the Government has the right to charge for that water power. Then when the Government says to you or to me or to a corporation, "You may make this improvement which the Government has the right and duty to make for the benefit of navigation, and we give you certain benefit in lieu of interest on the money that you put into this project." What is it that we do? We give the applicant an opportunity to make all he can out of this project in compliance with and under such conditions as we impose in the license. Usually it has been done by special act of Congress in each project. In this bill it will be done by permit of the commission without a special act. The Government has the right to do by an agent what it can do itself. It is a voluntary matter on the part of the private developer. The private developer does not have to do it, there is no compulsion placed upon him, we can not force him to do it and then make a charge for what he produces. There is no question that the United States Government has the right to make the charge. In fact, the Government has the right to make the charge because it has the right to make the development and sell the power directly as a means of reimbursing itself for the ex-

> penditure, and would have absolute control of the price or charge made for the power disposed of by it. Therefore it has the right and power if any applicant seeks for his own profit or his own benefit to make the development, that he must do it under such limitations and conditions as the Government places on him, and which are set out in and made a part of the license.
>
> * * * * * *
>
> Mr. ALEXANDER. I want to say to the gentleman from New York that the provision of the Constitution that a just compensation shall be paid for private property for public use does not apply here at all. Here are water powers belonging to the people that we are undertaking to license to people to use under proper governmental regulations, and it is for Congress to prescribe the regulations. If they do not accede to the regulations, they do not have to build plants or operate them. The provision of the Constitution that I have referred to does not apply here, for they do not have any property in the water power and can not acquire any.

This legislative history confirms the purpose of Congress, as expressed in the licensing provisions of the Act, not to recognize or allow private property rights in power site value. It follows that such value is not compensable under the applicable federal statutory provisions.

Since the enactment of the Act, the Federal Power Commission has only twice had occasion

to express its opinion on the question of power site value, so far as we have been able to ascertain. On the first occasion the Commission disallowed ~~certain~~ write-ups in land transactions between affiliated companies which a license on the Coosa River, a navigable water of the United States, claimed as part of its "net investment" and sought to justify by an engineering valuation based on power site value. *Alabama Power Company*, 1 F. P. C. 25, 36–37,[16] reviewed, *Alabama Power Co.* v.

[16] The Commission there said in part: "The right to develop water power in a navigable stream is not in any case a riparian right attaching to adjacent lands such as the right to the free and natural flow of the stream. *U. S.* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 75–76. It is a special right granted by the sovereign to obstruct its natural flow in a way that, unless properly safeguarded, would destroy its navigability. As such it is a grant in the nature of a franchise, which, when used in a business, has no value except such as it acquires from surplus earnings of the business not required for a reasonable return on other property use. It is entitled to no allowance under the Federal Water Power Act other than what it costs to acquire it, not only because we are strictly limited under that act to the allowance of actual costs, but because such an allowance would be inconsistent with the uses for which this determination is authorized; inconsistent with its use for rate or security regulation, since earnings depend upon rates, and rates cannot, therefore, be based upon valuations which find their origin in earnings; inconsistent with its use in recapture, since under any view the franchise for which such value is claimed will then have expired. This is in harmony with the general principle of utility law that values for franchises are not allowable for regulatory purpose except to the ex-

McNinch, 94 F. 2d 601, 616 (App. D. C.). There is language in the Commission's opinion indicating that if there were any water rights, their cost was included in the actual cost of the lands which the Commission had allowed. That reference is to rights under state permits acquired by filing plans with the Secretary of State for Alabama in 1908. On remand, the Commission, to comply with the terms of the Court's opinion, made a further allowance of dam site costs. Such costs included costs of similar state permits. 2 F. P. C. 312, 320, affirmed, *Alabama Power Co.* v. *F. P. C.*, 128 F. 2d 280, 284 (App. D. C.). In all of these

---

tent of the actual cost incurred for their acquisition. See *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Consolidated Gas Co.* v. *Newton*, 267 Fed. 231, affirmed 258 U. S. 165; *Consolidated Gas Co.* v. *Prendergast*, 6 F. (2d) 243; *Pacific Gas & Electric Co.* v. *San Francisco*, 273 Fed. 937, reversed on other grounds, 265 U. S. 403; *Georgia Ry. & Power Co.* v. *Railroad Commission*, 278 Fed. 242; *Brooklyn Union Gas Co.* v. *Prendergast*, 7 F. (2d) 628; *Public Utilities Commission* v. *Capital Traction Co.*, 17 F. (2d) 673; *Public Service Gas Co.* v. *Board of Public Utility Commissioners*, 87 N. J. L. 581, 94 Atl. 634; *Miles* v. *West* (Md.), 135 Atl. 579; *Re Flambeau Power Co.* (Wisc., P. U. C.), P. U. R. 1931–B, 17.

"The engineers' valuation before referred to is also inapplicable to the determination of the cost of these lands on the basis of their fair market value. It relates to their special and peculiar value to the licensee in the use designed for them, and is also predicated upon their income possibilities. While in the determination of fair market value every use to which the property is fairly adapted is entitled to consideration as affecting the price which should be obtainable for it at an unforced sale in a free and open market. *Nichols on Eminent Domain* (2d ed. vol. I), 658–667. Its special value in the particular use designed for it cannot be allowed. *Nichols on Eminent Domain* (2d ed. vol. I),

proceedings, neither the Commission, nor the Court of Appeals on review, considered the pertinent question of the validity of such state granted permits. Subsequent decisions have established their insufficiency. *Niagara Falls Power Co.* v. *F. P. C.*, 137 F. 2d 787, 791 (C. C. A. 2), certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815; *Pennsylvania Water & Power Co.* v. *F. P. C.*, 123 F. 2d 155 (App. D. C.), certiorari denied, 315 U. S. 806; *Wisconsin Public Service Corporation* v. *F. P. C.*, 147 F. 2d 743, 748–749 (C. C. A. 7), certiorari denied, 325 U. S. 880.

More recently, the Commission denied an application of the Niagara Falls Power Company for an amendment of language in its license bearing on payments that company contemplated making for assumed "water rights" for the use of water diverted from the Niagara River, also a navigable water of the United States, the application being denied in order to avoid an implication that the Commission approved the claim that such water rights had existence, are valuable and susceptible to purchase and sale."[17] *Niagara Falls Power Company*, 73 P. U. R. N. S. 28.

671–674; *United Fuel Gas Co.* v. *Railroad Comm.*, 278 U. S. 300, 317; *Minnesota Rate Cases*, 230 U. S. 352, 451; *U. S.* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 77."

[17] The Commission's opinion stated:

"Niagara River is a navigable water of the United States and an international boundary stream. In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 66."

To the foregoing Commission decisions might be added a recent order of the Commission in which the action of the licensee made an expression of Commission opinion unnecessary. *Bellows Falls Hydro-Electric Corporation, et al.*, Projects Nos. 1855, 1892, Docket No. E–6145, decided July 9, 1948. There an order determining actual legitimate original cost of a licensed project, on the Connecticut River, a navigable water of the United States, showed that the licensee had revised its claim, after staff audit, to eliminate amounts aggregating over $4,000,000 paid to International Paper Company and "independent" mills for "mill powers."[18]

II

THE COURT BELOW DECIDED ONE OR MORE FEDERAL QUESTIONS

We believe that the most simple avenue of approach to the problem of whether the decision be-

[18] The Commission's order contained the following recital: "After staff examination of the licensees' claimed cost of $14,283,165.75 and conferences with the licensees, the latter on June 7, 1948, filed a revised statement showing claimed actual legitimate original cost of $8,817,621.63, thus reflecting the elimination of 28 items aggregating $5,465,544.12 * * * representing the following:

Excess of initially claimed cost of mill properties and "mill powers" over depreciated original cost of mill properties acquired from International Paper Company	$3,899,317.92
Charges for "mill powers" from independent mills	210,414.09
Unsupported charge for "mill powers" between associated companies	130,000.00

* * * * *"

low raises any federal question is to measure the conclusion or judgment of the state court against the federal statutory provisions discussed above in order to determine whether there is an inescapable inconsistency between them. There can be no doubt that the Supreme Court of Oklahoma has made an award to the respondent which, in principal part, is attributable to power site value. We have pointed out in Point I A, *supra,* pp. 19–31, that the prospective use upon the basis of which the award in this case was made to Grand-Hydro was one which would affect interstate commerce. In Point I B of our Argument, *supra,* pp. 31–66, we have sought to show that under the rationale of this Court's decision in the *Chandler-Dunbar* case and the others that have followed *Chandler-Dunbar,* and under the Federal Power Act, the federal law denies to all persons any property right to use a non-navigable stream for the development of water power when such use would affect interstate commerce. Our conclusion has been that Grand-Hydro, as a matter of federal law, has no property interest in the land in question as a power dam site. Stated another way, our conclusion has been that one who can construct a hydroelectric project only upon license from the Commission and who, when licensed, has no property interest in the power-site value of his riparian land, has no greater property interest before he is licensed than he does after a license is issued to him.

We can see no means of reconciling the award below with these views on any ground, state or federal. And we do not understand that respondent contends otherwise. On this aspect of the case, the respondent seems to limit itself to the contention that these views are erroneous. See Brief in Answer to Brief for the United States, *passim*. But so long as these views are not "wholly insubstantial and frivolous", the necessary inconsistency between them and the award below raises a federal question. Cf. *Bell* v. *Hood*, 327 U. S. 678, 682–683. That federal question may be reviewed by this Court even in a local condemnation case when it is inescapably entangled with the ultimate question as to the amount of the condemnation award. *Nutt* v. *Knut*, 200 U. S. 12, 19; *Caldarola* v. *Eckert*, 332 U. S. 155; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483; cf. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 218.

The respondent's views on the question of federal jurisdiction are, as we have said, apparently not opposed to the conclusion just stated. Its attack on the jurisdiction of this Court seems to be confined to that aspect of the decision below which we have discussed in Point I A of our Argument, *supra*, pp. 19–31, *i. e.*, the "legality" of the use by Grand-Hydro of the lands in question as a dam site. The contention of the respondent is that the "state court merely has decided, in

respect only to the measure of compensation, that respondent was entitled to show adaptability of the land to use as a dam site despite the fact that petitioner became the only person that could so use it by virtue of the federal license", and that this decision is merely one of state law (Br. in Opp. p. 9).

While the respondent does not refer to *Miller's Executors* v. *Swann*, 150 U. S. 132, his argument is of the sort that finds some support in that decision. That case involved a dispute as to the title to property, one of the claimants relying on a transfer from a railroad and the other attacking the validity of that transfer on the ground that the state statute under which the railroad had taken title from the state and the terms of the mortgage binding the railroad conferred a right of sale only in accordance with the Acts of Congress granting the lands to the state to aid in the construction of certain railroads. This Court held that the "fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State does not make the determination of such rights a Federal question." 150 U. S. at 136–137.

It may be that the reference to federal law by the court below was also merely an adoption of federal law as state law. See *State Tax Com'n.* v. *Van Cott*, 306 U. S. 511, 514. But we think that a more accurate reading of the opinions below leads

to the conclusion that the state court, having posed the question of the legality of the use of the land as a power site (R. 91), answered that question first by reference to state law (R. 100), and then by reference to federal law (R. 676). The applicable rule would seem to be that "where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773.

While the Oklahoma court did not expressly state that, but for the taking by the petitioner, the respondent could lawfully have developed the power project contemplated by its experts, that is the net effect of its judgment. Its opinions can fairly be read as holding that there was a possibility of some lawful development of the site without Federal license. That possibility was apparently treated as the support for the award despite the fact, noted above (*supra*, pp. 26–27), that the hypothetical project upon which the award was in fact based was one which would require a federal license. When this fact is taken into account, as it must be, the award would seem to be erroneous on the federal grounds set out in Point I A of the Argument, *supra*, pp. 19–31.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

A. DEVITT VANECH,
Assistant Attorney General.

STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.

ROGER P. MARQUIS,
Attorney.

BRADFORD ROSS,
General Counsel,

HOWARD E. WAHRENBROCK,

WILLARD W. GATCHELL,
Assistants General Counsel,

JOSEPH B. HOBBS,
Attorney,
Federal Power Commission.

SEPTEMBER 1948.

APPENDIX

Section 10 of the River and Harbor Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

The Federal Power Act of June 10, 1920, c. 285, 41 Stat. 1063, as amended, provides:

> Section 3 (13), 16 U. S. C. 796 (13):
>
> The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> * * * * * *

"net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

* * * * *

Section 4 (g), 16 U. S. C. 797. (g):

The commission is hereby authorized and empowered—

* * * * *

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water

over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

* * * * *

Section 7, 16 U. S. C. 800:

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed de-

velopment as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

Section 10 (c), 16 U. S. C. 803 (c):

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

* * * * *

Section 14, 16 U. S. C. 807:

Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of

power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

* * * * *

Section 15, 16 U. S. C. 808:

That if the United States does not, at the exploration of the original license, exercise

its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: *Provided,* That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

Section 16, 16 U. S. C. 809:

That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and con-

trol thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

* * * * *

Section 19, 16 U. S. C. 812:

That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such

licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

* * * * *

Section 20, 16 U. S. C. 813:

That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securites to be issued by any of such parties or such

States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other

aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

* * * * * *

Section 23 (b), 16 U. S. C. 817:[13]

It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of

[13] Prior to August 26, 1935, this section read as follows:

That any person, association, corporation, State or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

Section 27, 16 U. S. C. 821:

That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948